THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NOS. 2017-207-E, 2017-305-E, AND 2017-370-E

IN RE:	Friends of the Earth and Sierra Club, Complainant/Petitioner vs. South Carolina Electric & Gas Company, Defendant/Respondent	)	
IN RE:	Request of the South Carolina Office of Regulatory Staff for Rate Relief to SCE&G Rates Pursuant to S.C. Code Ann. § 58-27-920	)	**RESPONSE TO MOTION TO COMPEL DISCOVERY RESPONSES AND PRODUCTION BY SCE&G AND DOMINION ENERGY**
IN RE:	Joint Application and Petition of South Carolina Electric & Gas Company and Dominion Energy, Incorporated for Review and Approval of a Proposed Business Combination between SCANA Corporation and Dominion Energy, Incorporated, as May Be Required, and for a Prudency Determination Regarding the Abandonment of the V.C. Summer Units 2 & 3 Project and Associated Customer Benefits and Cost Recovery Plans	)	

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INTRODUCTION

South Carolina Electric & Gas Company ("SCE&G") and Dominion Energy, Inc. ("Dominion Energy") (collectively, "Joint Applicants"), pursuant to 10 S.C. Code Ann. Regs. 103-829 (2012), hereby respond to the May 23, 2018 motion by the South Carolina Office of Regulatory Staff ("ORS") seeking to compel the production of certain documents.[1] Contrary to ORS's assertions, Joint Applicants' discovery responses are consistent with South Carolina law and well-established precedent on attorney-client privilege, relevance, and confidentiality. Joint Applicants have provided timely responses to ORS's six sets of audit information request for records and information, consisting of 370 individual requests, with multiple subparts, that have been served upon Joint Applicants in the above-referenced dockets (the "Discovery Requests" or "Requests").[2] Prior to serving its seven sets of Discovery Requests, ORS served upon SCE&G four other sets of audit information request for records and information, consisting of 84 requests, bringing the total set of Discovery Requests to 12, and the total number of requests to 454. Further, ORS's audit department, utility rates department, and nuclear department have made, and continue to make (the latest of which was received on Friday, June 8, 2018), demands for information and data separate and apart from ORS's Discovery Requests on a recurring basis. To date, Joint Applicants have produced over 91,500 pages to ORS.[3] Moreover, Joint Applicants have provided

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[1] While ORS directed the motion to both SCE&G and Dominion Energy, the substantive requests that are the subject of the motion primarily or exclusively relate to SCE&G. Therefore, Dominion Energy joins in this response to ORS's motion only to the extent that it relates to Dominion Energy, and otherwise defers to SCE&G's response on those matters that do not relate to Dominion Energy.

[2] On May 30, 2018, ORS served its seventh set of audit information request for records and information upon Joint Applicants consisting of 26 requests with sub-parts.

[3] In stark contrast, ORS has refused to produce a single document in response to Joint Applicants' discovery demands of ORS. If ORS continues to refuse to comply with its obligations as a party

a detailed explanation of their objections in their May 16, 2018 response to ORS's May 9, 2018 letter regarding discovery issues. *See* ORS Mot. Exs. A, D.

Despite Joint Applicants' good-faith efforts in responding to ORS's voluminous demands, ORS has continued to demand that Joint Applicants produce large quantities of irrelevant, confidential, and privileged information, all on a compressed time frame. These demands lack merit. Discovery in South Carolina is limited to non-privileged matters that are relevant to the subject matter of the pending action. 10 S.C. Code Ann. Regs. 103-833 (2012); S.C.R.C.P. 26(b)(1).[4] ORS, however, seeks to compel production of documents and information wholly irrelevant to the proceedings currently before the Commission. ORS similarly has requested extensive amounts of confidential and sensitive information without providing adequate assurance that such information will be protected if produced; however, S.C. Code Ann. § 58-4-55(D) specifically allows a public utility to object to ORS's Discovery Requests and seek relief regarding such discovery, including without limitation the entry of a protective order. Further, ORS seeks the production of privileged documents, or in the alternative, a privilege log, even though SCE&G repeatedly has informed ORS that it will be providing a log containing information about the privileged documents and the bases for withholding them. Again, discovery is limited to non-privileged matters. 10 S.C. Code Ann. Reg. 103-833 (2012). Joint Applicants' objections to these Discovery Requests are proper, and ORS's motion to compel responses to them should be denied.

Many of the privileged items that ORS currently seeks are related to the engagement of Bechtel Power Corporation ("Bechtel"). In this regard, ORS's motion quotes from scattered

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of record to produce non-privileged information, then Joint Applicants will be left with no option but to file a motion to compel against ORS.

[4] "The S.C. Rules of Civil Procedure govern all discovery matters not covered in Commission Regulations." 10 S.C. Code Ann. Regs. 103-835 (2012).

documents, many of which were obtained from the South Carolina Public Service Authority ("Santee Cooper"), a state-owned entity and SCE&G's partner in the V.C. Summer Units 2 and 3 construction project (the "Project"), to paint a grossly incomplete and misleading picture of SCE&G's involvement with Bechtel and the subsequent privileged report issued by Bechtel (the "Bechtel Report" or the "Report"). Such reliance on selective, self-serving, incomplete, and unverified Santee Cooper documents is misguided. To claim, as ORS does, that the Report was commissioned by SCE&G's and Santee Cooper's (the "Owners") legal counsel in order to protect Westinghouse Electric Company LLC ("Westinghouse") and Chicago Bridge and Iron ("CB&I") (collectively, the "Consortium") in connection with Westinghouse's litigation over the completely distinct Vogtle project makes no sense, and is demonstrably wrong. ORS Mot. at 8-9. ORS provides no explanation for why the Owners' legal counsel would seek to hire a consultant for the sole purpose of protecting his clients' adversary, namely the Consortium, in litigation involving the Consortium and a separate party.

This explanation for retaining Bechtel is irrational and inaccurate. Rather, in the 2014 to 2015 time frame, concerns with the cost and schedule to complete the Project and the Owners' numerous other issues with the Consortium were known to everyone, including ORS, the Public Service Commission of South Carolina (the "PSC" or the "Commission"), and SCANA Corporation's ("SCANA") investors, and the likelihood of resulting litigation between the Consortium and the Owners was evident. In fact, both Santee Cooper and SCE&G expressly discussed the likelihood of litigation against the Consortium (including the possibility of pursuing potential affirmative claims). This is why the Owners' counsel hired Bechtel—to assist in the evaluation of potential litigation against the Consortium—and this is more than enough to render

the Bechtel Report and documents related to the assessment privileged and protected by the work-product doctrine.

While ORS characterizes SCE&G's position related to the privileged nature of the Bechtel Report as one of "continued concealment" to keep information "hidden," ORS Mot. at 2, nothing could be further from the truth. As SCE&G consistently has explained, and consistent with the practice of any competent litigator, the Owners' legal counsel, amidst escalating tensions between the Owners and the Consortium, engaged a non-testifying, consulting expert (Bechtel) to assist the Owners' counsel with providing legal advice regarding possible litigation against the Consortium in connection with the construction of the Project. As such, the Bechtel Report and documents and communications related to the Report are privileged and exempt from disclosure, and ORS's selective references to certain Bechtel-related documents obtained from Santee Cooper does not and cannot constitute a waiver of the attorney-client privilege by SCE&G. None of the cherry-picked quotations and other sources compiled by ORS refute this fact.

In addition, ORS's motion ignores the preliminary and incomplete nature of the assessment—limitations acknowledged by Bechtel itself—resulting from the short time frame Bechtel had to conduct the assessment as well as other issues Bechtel experienced accessing relevant documents from Westinghouse, including its inability to download from Westinghouse the massive Project schedule. Moreover, ORS's motion ignores Santee Cooper's and Bechtel's primary motive related to the Report—to secure a larger, more permanent role (and more money) for Bechtel on the Project. These motives were in direct conflict with the actual scope and purpose of the engagement—to assist the Owners' legal counsel in evaluating the current status and forecasted completion plan of the Project in anticipation of litigation with the Consortium (all prior to executing in October 2015 the amendment to the Engineering, Procurement and Construction

Agreement (the "EPC Amendment"))—which, in turn, severely impacted the usefulness of the Report.

Notwithstanding the foregoing, in light of the inaccuracies and omissions in ORS's motion, SCE&G has determined that it is incumbent upon it to provide the Commission with a full account of Bechtel's involvement with the Project, which will show that SCE&G (i) was skeptical of Bechtel's true motives concerning the Project, a skepticism that has been borne out by recent revelations that Santee Cooper and Bechtel affirmatively concealed from SCE&G their plan to use the assessment as a springboard for Bechtel to slide into a high-paying ongoing consulting role on the Project; (ii) had no confidence in the Report based on the limited data Bechtel obtained from Westinghouse and the elementary scheduling methodology used by Bechtel; and (iii) that the Report's "findings" revealed nothing new and were largely addressed by the EPC Amendment. Accordingly, even though SCE&G has the legal right to maintain the confidentiality of a privileged engagement, SCE&G, through its parent company SCANA, has decided to produce documents that provide the full account of the Bechtel engagement and assessment, including the communications related to the engagement of Bechtel and the ensuing Bechtel Report (collectively, the "Bechtel Materials").[5] As explained below, these communications demonstrate both (1) the good-faith basis of SCE&G's position that the Report was privileged, and (2) the overall prudence of SCE&G's actions with respect to the Report.

SCE&G's decision to disclose the privileged Bechtel Materials renders the remainder of ORS's motion moot. The Commission should accordingly deny the motion in its entirety.

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[5] To be clear, by doing so, SCE&G does not waive attorney-client privilege for communications that concern any other aspects of the Project or other issues before the Commission, nor does it waive attorney-client privilege or work-product protection for documents related to Bechtel that SCE&G may have an independent basis for withholding based on a claim of privilege.

DISCUSSION

I. Requests Nos. 2-5, 6-6, 6-7, 6-8, and 6-9: Bechtel Materials

ORS has sought the production of the Bechtel Report and "its drafts, alternative reports, working papers, references, responses, and other related documents, including all communications relating to the assessment of the Report." ORS Mot. at 4. As noted, SCE&G will produce these materials. Still, it is important to set the record straight regarding Bechtel.

First, the Owners' legal counsel in good faith engaged Bechtel to provide an assessment of the Project that would assist with possible future litigation against the Consortium. By late 2014, significant disputes had arisen between the Owners and the Consortium regarding Project delays and the Owners' withholding of millions of dollars of payments from the Consortium based on such delays. This fact is reflected in key documents that repeatedly refer to the threat of litigation, the need to engage Bechtel under the attorney-client privilege to protect any work done by Bechtel from disclosure to the Consortium in any subsequent litigation, and the fact that Bechtel's work was, in fact, subject to attorney-client privilege and work-product protection in connection with the anticipation of litigation.

Second, Bechtel's assessment of the Project was of a limited scope, depth and duration, conducted only over an eight-week timespan, with limited data and without necessary consideration of the opportunities to improve the schedule and productivity through mitigation. Because Bechtel was a direct competitor of Westinghouse, Westinghouse was reluctant to provide Bechtel with access to underlying documents related to the Project schedule, meaning that Bechtel, by its own account, did not have access to the data it needed to conduct a full schedule assessment. Bechtel's access to relevant data was also limited because it was unable to download the Consortium project schedule (at least prior to an October 2015 presentation) due to its enormous size and detail and because the documents were kept in a reading room, where Bechtel had limited

access. Further, because the existing schedule was large and detailed, and Bechtel had a limited time to review it, Bechtel opted to resort to guess-work to create its own schedule based on its prior experience in nuclear construction, which did not include any projects comparable to this one. Bechtel made a number of assumptions that were not based on actual Project realities rather than thoroughly assessing the existing schedule.

Third, before the Bechtel Report was completed, the Owners concluded negotiations with the Consortium to amend the existing EPC Agreement, including resolving many of the issues that Bechtel was reviewing. The EPC Amendment included guarantees from the Consortium that would severely penalize the Consortium if the Project did not stay on track and also resolved many (but not all) of the pending disputes between the Consortium and the Owners. Among other things, these guarantees included: (1) an option to transform the principal remaining scopes of work to be done under the EPC Agreement to a 100% fixed price basis, which would place the primary risk of cost overruns squarely on Westinghouse; (2) new substantial completion dates for Units 2 and 3, which had been evaluated and tested by Westinghouse—unlike the guess-work schedule provide by Bechtel; (3) increased liquidated damages (four times larger than those contained in the original EPC Agreement) for the Owners if the Project were incomplete by the agreed-upon substantial completion dates; (4) substantial bonuses for Westinghouse if it completed the Project on time; and (5) reaffirmation by Westinghouse's parent company, Toshiba Corporation ("Toshiba"), of its guarantee of Westinghouse's payment obligations under the EPC Agreement. The EPC Amendment addressed many of the underlying points raised in the Bechtel Report. Thus, upon receiving Bechtel's preliminary assessment in October 2015, SCE&G found Bechtel's assessment to be unreliable and of limited usefulness because it was based on limited scheduling data and pointed out problems that the EPC Amendment had addressed.

Fourth, we now know that Santee Cooper and Bechtel were not transparent with SCE&G and the Owners' attorney, and in fact were working together to tailor a report that suited Bechtel's interests in expanding and extending its role on the Project. From at least January 2015 through December 2015, Santee Cooper secretly worked with Bechtel, without involving its partner, SCE&G, to plan Bechtel's assessment proposal, shape the assessment itself, and structure the Report with a goal of securing Bechtel a permanent and more lucrative position as an Owners' engineer on the Project. Such actions raise serious questions about Bechtel's motives and incentives, the impartiality of its assessment, and the reliability of its conclusions.

Finally, the limited key Bechtel findings revealed nothing to the Owners that they did not already know and were consistent with information previously disclosed by the Owners.

A. Bechtel Report Background.

1. The Owners Hire the Law Firm of Smith, Currie & Hancock LLP as Legal Counsel in Connection with the Project.

As early as December 2011—nearly four years before the Bechtel engagement—the Owners hired Smith, Currie & Hancock LLP ("Smith, Currie & Hancock" or "SCH"), a law firm specializing in construction law, and specifically, George Wenick, to provide legal advice in connection with the Project. ORS was aware of this engagement. On a monthly basis and as part of its auditing function, ORS selected items from the Owners' work order to verify that the charges matched the charges appearing on the invoice received from a vendor. Affidavit of Sheri Wicker ("Wicker Aff."), attached hereto as Ex. 1, at ¶ 4. As early as 2012, and in 2013, 2014, 2015 and 2017, ORS selected certain Smith, Currie & Hancock invoices for review—invoices which provided details about the firm's work in connection with the Project. *Id.* ¶ 5. Thus, contrary to ORS's assertion, Smith, Currie & Hancock was not hired at the time of the assessment to shield a "hidden" Report under the guise of privilege. Rather, Smith, Currie & Hancock had been serving

as outside legal counsel to the Owners for years, providing legal advice on Project-related matters, ***and ORS had known that to be the case for years.***

During 2015, ORS became specifically aware that Smith, Currie & Hancock had hired Bechtel to provide expert support for potential litigation against the Consortium. In fact, in 2015, ORS requested Smith, Currie & Hancock's July 2015 and August 2015 invoices to SCANA/SCE&G. *Id.* ¶ 6. These invoices reference Smith, Currie & Hancock's work related to Bechtel Corporation, including its engagement of Bechtel Corporation for an assessment of the Project. *Id.* ¶ 6. And by its own admission, ORS specifically reviewed and approved the expense from that invoice, among others related to the Project, to be included in SCE&G's revised rates calculations. *See* August 29, 2016 South Carolina Office of Regulatory Staff Report on South Carolina Electric & Gas Company's Annual Request for Revised Rates, Docket No. 2016-224-E, at 4-5, attached hereto as Ex. 39 (confirming that for expenses incurred through June 30, 2016, ORS sampled invoices, verified mathematical accuracy of sampled invoices, and ensured that the nature of each sampled expenditure appeared to relate to the Project). The provision of this invoice to ORS in 2015, which shows that the Owners had sought legal advice from Smith, Currie & Hancock related to potential litigation with the Consortium and that an assessment by Bechtel was being conducted, negates any claim that the nature of the engagement was somehow concealed. In addition to knowing in 2015 that Bechtel had been hired by Smith, Currie & Hancock, ORS also knew of the charges for Bechtel's services because ORS reviewed the Project work order monthly, and Bechtel's charges appeared on the work order. *See* Ex. 39, at 4-5 (obtaining invoice level-listings of all charges to construction work in progress during the time period of July 2015 to June 30, 2016). To erase any remaining doubt of ORS's knowledge of Bechtel's involvement on the Project, ORS included as part of its "SCE&G VC Summer Units 2 & 3 October 27 & 28,

2015 Site Visit Agenda" the following: "***Discuss the Status of the Bechtel Assessment and the top ten issues noted thus far.***" *See* Ex. 40 (emphasis added).

2. Smith, Currie & Hancock Hires Bechtel to Assist with Legal Advice Regarding Possible Litigation Against the Consortium.

The Bechtel Report arose in the context of threatened litigation against the Consortium. By the summer of 2014, the Project trajectory increasingly put the Consortium and the Owners at odds, and it was obvious that Westinghouse and CB&I were not getting along. In August 2014, the Consortium provided the Owners with a "new Revised, Fully-Integrated Construction Schedule" for the Project, adjusting the Project's baseline schedule and indicating that Unit 2 would not be completed until late 2018 or early 2019 and Unit 3 would be approximately 12 months behind. *See* SCE&G Quarterly Report to ORS, for the quarter ending September 30, 2014, at 2-3, a copy of which was also filed with the Commission in Docket No. 2008-196-E. In effect, by August 2014, the Consortium had extended the substantial completion dates for Unit 2 by more than two years from the original forecasted dates in the EPC Agreement (from April 1, 2016 to late 2018 or early 2019) and for Unit 3 by approximately one year (from January 1, 2019 to late 2019 or early 2020), and the cost of the Project had increased (per the Consortium's estimations) by approximately $500 million from the originally forecasted $6.3 billion cost to $6.8 billion.[6]

While the Owners and the Consortium tried to work out their disagreements over (among other things) who was responsible for the increased costs resulting from the schedule delays, the Owners were concerned that continued progress payments to the Consortium would result in completing these scheduled payments before the Project was completed. This concern stemmed from the fact that these progress payments were paid in set amounts on various dates over the anticipated life of the Project, and the payment schedule was based on an earlier version of the

[6] These amounts represent SCE&G's 55% share of the Project costs.

Project schedule. Accordingly, the Owners suspended progress payments in the fall of 2014. In a September 25, 2014 letter from Stephen Byrne (SCE&G Chief Operating Officer) to Jeff Lyash (CB&I), Mr. Byrne outlined the Owners' escalation cost concerns:

> Those Payment Schedules, in their current form, would require full payment well in advance of when the Consortium expects to complete the Project. The disconnect is almost certain to worsen with the upcoming re-baselined work schedule. We have addressed this problem by rejecting recent requests for payments that were not justified by the Consortium's current Project Schedule. . . . The Consortium has no right to be rewarded for unexcused Project delays by receiving payment in advance of when it actually performs the work.

Ex. 2.

On the same day, the Consortium responded to SCE&G:

> In the event that the Owner fails to pay these invoices within fifteen (15) Days of the Owner's receipt of this letter . . . '[the] Contractor has the right to suspend performance of the Work as if Owner had ordered a suspension in accordance with Section 22.1.' The Consortium expressly reserves its right to do so along with exercising its rights under Section 22.5 to terminate the Agreement and any other remedy available to it.

Ex. 3. As one would expect, suspending these progress payments escalated tensions between the Owners and the Consortium considerably and raised the prospect that the Project was headed toward litigation. So, the Owners began to consider retaining consulting experts to assist them should the dispute with the Consortium turn to litigation. In late 2014, the Owners met with Mr. Wenick to evaluate potential litigation against the Consortium and expressly discussed the need to hire outside experts, including a "scheduling" expert, to assist in any potential litigation. Ex. 4. Mr. Byrne's notes from a December 17, 2014 meeting indicate that Mr. Wenick advised the Owners of the "need to engage consultants (forensic[,] accounting[,] scheduling[,] civil…)" for an "indep[endent] look." *Id.* **In response, former South Carolina Circuit Court Judge J. Michael Baxley, Santee Cooper's Senior Vice President and General Counsel, indicated that these**

"same consultants [which Mr. Wenick was advising the Owners to consider engaging] would be useful if [the parties] g[ot] to litigation." *Id.* SCANA Chief Executive Officer Kevin Marsh's notes from the same meeting indicate that the Owners should "begin looking for experts from the outside: Forensic Accounting[,] Civil Engineering[,] Scheduling". Ex. 5.

Santee Cooper initially proposed the idea of involving Bechtel with the Project, as evidenced in documents ORS attached to its own motion. In January 2015, Lonnie Carter and Michael Crosby, Santee Cooper's Chief Executive Officer and Senior Vice President for Nuclear Energy, respectively, met with Bechtel to discuss a possible assessment of the Project. ORS Mot. Ex. E, at 00079114-16. Bechtel subsequently sent Santee Cooper a draft assessment proposal on February 5, 2015. *Id.* SCE&G was neither present at the meeting nor received the draft proposal. Rather, Santee Cooper informed SCE&G of the Bechtel proposal two weeks later, at a February 17, 2015 meeting. Exs. 6-7.

Both SCE&G and Mr. Wenick had concerns about hiring Bechtel. SCE&G was aware that a Santee Cooper board member had a pre-existing relationship with Mike Adams, then Senior Vice President Strategic Products at Bechtel and previously Bechtel's Chief Financial Officer. Exs. 7-8. SCE&G was concerned this relationship could influence Bechtel's independence in connection with the assessment. SCE&G likewise was concerned that Bechtel had an incentive to create an unfavorable report as a means to pitch for additional work. SCE&G further was worried that, in the likely event of litigation with the Consortium, any report by Bechtel, regardless of what it said, would be discoverable in litigation with the Consortium. Nonetheless, and even though it had authority as majority owner to decline to retain Bechtel, SCE&G saw the potential value of an independent assessment and agreed with its counsel's recommendation to hire Bechtel to better understand the challenges of the Project in anticipation of litigation and also to ensure the Project

was on track to be completed on time and on budget. Importantly, Mr. Wenick and Bechtel agreed that "Bechtel will evaluate the current status and forecasted completion plan through the design, supply chain, and construction aspects of the Project . . . [including] understanding the issues that have caused impacts to date [and] assessing the effectiveness of the mitigation plans put into place to address those issues[.]" Ex. 9 at 4.

Between early May and early August 2015, SCE&G and Santee Cooper had extensive discussions about how to scope and structure Bechtel's assessment. *See, e.g.*, Exs. 10-11.[7] These discussions also included negotiations with the Consortium about their cooperation with any assessment. *See, e.g.*, Ex. 12 (email between Senior Vice President and Chief Nuclear Officer, Jeff Archie, and Mr. Byrne in which Mr. Archie reports that "precluding complications" with the litigation between Southern Nuclear and the Consortium was a potential means of gaining the Consortium's cooperation). SCE&G and Santee Cooper ultimately agreed that Bechtel had to be hired in anticipation of litigation. *See, e.g.*, Exs. 11, 13, 15.

Mr. Wenick was "in favor of hiring Bechtel" when approached about the possible engagement, but he wanted to make sure that it was done in anticipation of litigation and that any ultimate report would not be discoverable. Ex. 14. Mr. Wenick expressed concern with the language in Bechtel's draft assessment proposal which indicated that Bechtel "will not evaluate the ownership of past impacts or validity of pending or future claims" because this language was inconsistent with hiring Bechtel "in anticipation of litigation or to prepare for trial." *Id.* ORS makes much of the fact that Bechtel's draft assessment proposal dated February 5, 2015 and a

[7] On July 21, 2015, SCE&G appeared before the Commission in Docket No. 2015-103-E. At the hearing in this docket, Mr. Byrne testified that disputes had arisen between the Owners and WEC concerning costs. When asked, "How will these disputes be resolved?," Mr. Byrne responded, "SCE&G is committed to resolving these disputes by negotiation, if possible. However, litigation may occur." Ex. 41.

subsequent July 13, 2015 email from Bechtel indicate that Bechtel was unwilling to "review the attribution of past impacts or validity of any pending or future claims." ORS Mot. at 9. However, this argument has no merit as the final negotiated agreement between Mr. Wenick and Bechtel, discussed in further detail below, includes no such language. Rather, the agreement expressly states that "[i]t is agreed that Bechtel is being engaged in anticipation of litigation or other dispute resolution process related to the Project but is not being engaged as a testifying expert." Ex. 15 ¶ 5.

Mr. Wenick advised the Owners about the dangers of hiring an expert with only a limited amount of time to study the Project unless it was done under the protection of the attorney-client privilege. A quick-turn-around study could contain conclusions based on incomplete data and analysis—as in fact was the case with the Bechtel Report—and could be used against the consultant's client if discoverable. In a July 8, 2015 email, Mr. Wenick advised the Owners that "[his] practice is to engage experts directly in situations like [this] through a written agreement. In this case, that agreement should be clear in stating that Bechtel is being engaged as an expert in anticipation of litigation, which is necessary to make its reports privileged, as we have previously discussed." Ex. 16. Further, in a July 14, 2015 email, Mr. Wenick emphasized "the importance of protecting Bechtel's eventual report from disclosure based on [his] experience in a similar matter." Ex. 17. Mr. Wenick referred to past construction litigation where a partially-formed and preliminary expert opinion commissioned by the other side was released that effectively decided the case in favor of Mr. Wenick's client. *Id.* Mr. Wenick was concerned that this could happen in

a future dispute between the Owners and the Consortium if Bechtel's report was not conducted under the protection of the attorney-client privilege. *Id.*[8]

On August 6, 2015, Mr. Wenick's law firm, Smith, Currie & Hancock, hired Bechtel as a consultant. A Professional Services Agreement ("PSA") governed the terms of Bechtel's engagement. The PSA made clear that Bechtel was hired to assist Smith, Currie & Hancock in providing legal advice regarding possible litigation. The Owners were in agreement to structure the engagement in this manner. The PSA stated Bechtel "agrees to provide professional consulting services to Smith, Currie & Hancock in connection with SCH's representation of [the Owners] concerning the Project." Ex. 15. It further provided that any communications between Bechtel and Smith, Currie & Hancock or SCE&G were confidential "and made solely for the purpose of assisting SCH in giving legal advice to [the Owners]." *Id.* ¶ 1. "[U]nless otherwise notified in writing by SCH," Bechtel was to take all direction from and address all correspondence to Smith, Currie & Hancock. *Id.* ¶ 10. As the documents demonstrate, however, this did not happen. Instead, Santee Cooper secretly worked with Bechtel in an effort to secure for Bechtel a larger role on the Project, as is further discussed below.

On August 7, 2015, the Owners and the Consortium entered into an "Agreement Regarding Owner's Project Assessment" ("Agreement"), under which the Consortium agreed to provide "reasonable support" to Bechtel. Ex. 18. The Agreement provided that "[t]he purpose of the Assessment is to assist in Owner's counsel's provision of legal advice to Owner relating to the Project" and that "all papers, documents and communications generated by Owner, Owner's

[8] This is standard litigation practice. Imagine a scenario in which Mr. Wenick had not taken steps to protect the consulting expert's findings; litigation ensued; and the consulting expert's work doomed the Owners' claims. In that case, ORS (and others) could argue that the Owners were not prudent in preparing and asserting their claims to the detriment of ratepayers.

attorneys and Bechtel," as well as the Bechtel Report itself, "are intended to be and shall be legally privileged as attorney-directed work product and attorney-client privileged communications." *Id.* ¶ 2. The Agreement also provided that "Owner and Contractor agree that Bechtel is a non-testifying expert as provided by Fed. R. Civ. P. 26(b)(4)(D)." *Id.*

3. Bechtel Begins Its Assessment While Secretly Working with Santee Cooper to Secure a Larger Role on the Project.

Bechtel began requesting information from the Consortium on the Project in July 2015. But Bechtel quickly ran into problems. In an August 21, 2015 email to the Owners' Chief Executive Officers, Bechtel employee Craig Albert noted that "[t]hings are progressing much slower than necessary" and Bechtel was "significantly lacking the important engineering, procurement, and construction quantitative data necessary to perform a comprehensive schedule and cost assessment of the to-go effort." This was the case, in part, because the Consortium had understandable concerns about providing documents to a major competitor—Bechtel had been an unsuccessful bidder against the Consortium for this specific Project. For that reason, the Consortium limited Bechtel's access to the Consortium's documents to a reading room where they could be reviewed.[9] Exs. 19; 20 at 3-4. Problems with access to information persisted throughout the assessment, and limited the factual basis and reliability of the Bechtel Report. Specifically, in its Report, Bechtel stated the following:

> Some data and information was provided electronically by the Owners and the Consortium. For the majority of data and information, a single hard copy was placed in a reading room at the site and no additional copies could be made. This limited the ability of the Bechtel team to fully assess the information (e.g., engineering schedules, ROYG (red-orange-yellow-green) report, etc.). Further, many documents that contained sensitive information (e.g., contract terms, financial details, etc.) were redacted.

[9] This means of facilitating Bechtel's review of the documents was contemplated in the August 7, 2015 Agreement between the Owners and the Consortium. Ex. 18 ¶ 3.

Ex. 20 at 3-4. In addition, Bechtel noted during an October 2015 presentation to the Owners that it was unable to even download the schedule, due to its size, further limiting the usefulness of its analysis and thereby calling into question the reliability of Bechtel's assessment. Ex. 21.

Bechtel's struggles to obtain the information necessary for its Report, however, did not prevent it from also working to generate more work for itself from the Project. Bechtel's efforts on this front were apparent even before it signed the PSA. In an email sent to the Owners in advance of a July 13, 2015 meeting, Bechtel listed as an item for discussion, "at risk of being presumptuous, discussion about 'beyond the assessment' (Watts Bar 500)." ORS Mot. Ex. E, at 00024735. "Watts Bar 500" was a reference to the fact that Bechtel would soon have 500 employees freed up from a project in Tennessee, and Bechtel was interested in finding work for these employees by transferring them to Jenkinsville, South Carolina. Ex. 10. Thus, even before the assessment was fully underway, Bechtel indicated that it wanted to create a long-term role for it and its 500 displaced employees from Tennessee. Of course, doing so involved Bechtel drafting a report that justified such a role.

Bechtel continued its efforts to create a long-term role for it and its 500 employees after it signed the PSA. It did so, coordinating these efforts with Santee Cooper without the knowledge or consent of SCE&G or the Owners' counsel, Mr. Wenick. As noted above, Santee Cooper and Bechtel had a pre-existing relationship, and had discussed a possible assessment weeks before raising it with SCE&G. Exs. 6-8; ORS Mot. Ex. E, at 00079114-16. Bechtel and Santee Cooper had continued to communicate directly throughout the course of the assessment, leaving out SCE&G and Mr. Wenick (who retained Bechtel and was Bechtel's client). Bechtel sent Santee Cooper draft communications and presentations meant for both SCE&G and Santee Cooper regarding the assessment in order to get feedback from Santee Cooper before sending them to

SCE&G. These communications frequently would criticize the performance of the Consortium, and then propose greater involvement of Bechtel as a solution. ORS Mot. Ex. E, at 00079188-89. For example, on August 24, 2015, Craig Albert of Bechtel sent Mr. Crosby of Santee Cooper a draft email addressed to the Chief Executive Officers of SCANA and Santee Cooper that reviewed Bechtel's problems collecting information from the Consortium. *Id.* As a solution, the draft email proposed SCE&G and Santee Cooper "engage Bechtel as its owner engineer (OE) and let the consortium members know that our involvement is not short term or superficial." *Id.* Mr. Crosby responded, "I believe the email approach is too aggressive at this point . . . and may even place Bechtel credibility at risk." *Id.*

4. Bechtel Shares Its Preliminary Findings, Many of Which Are Immediately Addressed by the EPC Amendment.

In October 2015, Bechtel reached its preliminary findings on the Project. We have only recently learned that Bechtel shared its findings with Santee Cooper before sharing them with SCE&G or Mr. Wenick. Ex. 22. In an October 13, 2015 email, Carl Rau, in direct violation of the PSA, shared a summary of Bechtel's initial findings with Mr. Crosby, who then forwarded the findings to Mr. Carter. *Id.* Mr. Crosby noted: "Carl has provided (you/me) preliminary bullet notes from the Assessment (see below) . . . SCE&G has not seen this yet. ***I do not see any real surprises. . . .***" *Id.* (emphasis added).

Bechtel shared its preliminary assessment with SCE&G and Santee Cooper at an October 22, 2015 meeting. Bechtel's presentation noted that its assessment was performed "for the purpose of assisting SCH in giving legal advice" and that the assessment's objective was to assist the Owners "to better understand the current status and potential challenges of the project in anticipation of litigation and also to help ensure the project is on the most cost efficient trajectory to completion." Ex. 9 at 4. Importantly, Mr. Wenick and Bechtel agreed that Bechtel would

"evaluate[] the current status and forecasted completion plan through the design, supply chain, and construction aspects of the Project . . . [including] understanding the issues that have caused impacts to date [and] assessing the effectiveness of the mitigation plans put into place to address those issues[.]" *Id.* In its presentation, Bechtel estimated that the completion date for Unit 2 would need to be adjusted 18 to 26 months, from June 2019 to a range of December 2020 to August 2021. *Id.* at 24. Bechtel estimated that the completion date for Unit 3 would need to be adjusted 24 to 36 months, from June 2020 to a range of June 2022 to June 2023. *Id.*

Although Bechtel's preliminary schedule assessment included projected completion dates that were later than those subsequently agreed to in the EPC Amendment, the Bechtel Assessment expressly noted the "limited [] ability to fully assess the [scheduling] information" from the Consortium and the Owners. *Id.* at 6. In other words, even Bechtel had reservations about its work product. Bechtel's schedule projection also expressly relied on a number of "key assumptions," the foremost of which was that "[c]urrent civil progress and performance w[ould] remain unchanged." *Id.* at 23. However, SCANA repeatedly disclosed in its securities filings and its quarterly reports to ORS and the PSC that the anticipated completion dates were subject to a number of mitigation measures that the Consortium was seeking to implement. *See, e.g.*, SCE&G Quarterly Report to ORS, for the quarter ending June 30, 2015 ("The current schedule for production of the Shield Building panels will require remediation to support the updated substantial completion dates. Negotiations concerning the mitigation plan are on-going."); September 10, 2015 PSC Order No. 2015-661, Docket 2015-103-E, attached hereto as Ex. 23, at 21 ("The ability of WEC/CB&I to achieve these productivity improvements and accomplish the required schedule mitigation is not guaranteed. . . . For that reason, the construction schedule presented here is dynamic and will likely change several times before the project is complete.").

Further, the schedule assessment was expressly based on historical Bechtel data from other nuclear projects constructed under different federal licensing regimes—not the unique one that governed the Project. Ex. 9 at 22. Given these and other limitations, Bechtel expressly stated that its schedule assessment was "preliminary" and that "[a] more robust approach [wa]s needed prior to finalization of ***any*** changes to the baseline [schedule] target." (*Id.* at 25) (emphasis added). Consistent with this acknowledgment, notes taken at the meeting reflect that Carl Rau stated Bechtel "would have to go much deeper to accurately predict SKED [schedule] probabilities." Ex. 24.

It was apparent to the Owners that the presentation was a sales pitch for an expanded role for Bechtel on the Project. In a subsequent letter to Mr. Marsh, Mr. Carter noted that he "was concerned that some of our team saw the presentation as a Bechtel sales pitch." Ex. 25 at 1. Nonetheless, the key takeaway from the Bechtel presentation—that the construction schedule was "at risk" if progress and performance did not change—was known to the Owners and repeatedly had been disclosed by SCANA and SCE&G (both before and after the assessment) in SEC filings, ORS quarterly reports, and in PSC testimony.[10] *See, e.g.*, Exs. 26-27.

Moreover, as the Owners knew, much of Bechtel's presentation was addressed by the EPC Amendment that the Owners and the Consortium executed a mere five (5) days later, on October 27, 2015. Among other things, the EPC Amendment resolved the majority of the outstanding disputes between the Owners and the Consortium. Ex. 28 ¶¶ 3, 16. An important part of the revised plan for the Project was that Westinghouse was to acquire Stone & Webster; that CB&I

[10] It is worth repeating that ORS was aware of the Bechtel assessment at this time. In 2015, ORS selected Smith, Currie & Hancock's July 2015 and August 2015 invoices for review, which provided details about Smith, Currie & Hancock's engagement of Bechtel. Wicker Aff. ¶ 6. And as part of its October 27 & 28, 2015 ORS Agenda, ORS included the following topic: "Discuss the Status of the Bechtel Assessment and the top ten issues noted thus far." Ex. 40.

would be released from its guarantee; and that Westinghouse's parent company, Toshiba, would affirm its guarantee of Westinghouse's obligations. *Id.* at 1, ¶¶ 17, 29. Westinghouse further committed to new substantial completion dates of August 31, 2019 for Unit 2 and August 31, 2020 for Unit 3, *id.* ¶ 6, dates which had been evaluated by consultants hired by Westinghouse based on schedule data that Bechtel admitted it could not download or process.

The EPC Amendment contained three additional significant changes. First, it contained enormous financial incentives (both rewards and penalties) for Westinghouse to meet the substantial completion dates. Westinghouse secured the opportunity to receive substantial bonuses if the units were completed on time ($150 million per unit if the fixed price option was exercised and $275 million per unit if it was not); and the amendment increased the liquidated damages provision, requiring Westinghouse to pay damages (four times larger than those contained in the original EPC Agreement) if the substantial completion dates were not met ($338 million per unit if the fixed price option was exercised or $463 million per units if it were not). Ex. 29. All told, Westinghouse stood to pay (in lost bonuses and in penalties) approximately $976 million if it failed to complete both units on time under a fixed price contract. Second, the EPC Amendment gave SCE&G the option to elect a fixed price arrangement that capped the total amount SCE&G would pay Westinghouse and thus shifted the cost of increased labor needed to meet the schedule to Westinghouse. Ex. 28 ¶ 2. Third, the EPC Amendment provided that Westinghouse would hire Fluor Corporation ("Fluor") as the construction manager for the Project. *Id.* at 1.

5. SCE&G Concludes that Bechtel's Schedule Assessment Is Unreliable.

On November 12, 2015, Mr. Wenick shared his assessment of Bechtel's presentation in an email to SCANA General Counsel Ronald Lindsay and Deputy General Counsel Al Bynum. Ex. 21. In his email, he reconfirmed the purpose of Bechtel's engagement: to "assist SCH and Owners in better understanding the current status and potential challenges of the Project in anticipat[ion]

of litigation and also to help ensure the Project is on the most cost efficient trajectory to completion." *Id.* After analyzing Bechtel's preliminary findings, he concluded that Bechtel's analysis ***was not usable for that purpose.*** *Id.* Mr. Wenick explained that Bechtel had admitted that it had not based its schedule analysis on the current Project schedule used by the Consortium, which was too large and complex for Bechtel to understand in the limited time frame it had. Instead, Bechtel presented a high-level schedule based on its prior experience with similar projects. Mr. Wenick found this simplified analysis "not sufficiently mature to provide meaningful insights into the schedule or the anticipated completion date." *Id.* Importantly, he concluded:

> Having retained Bechtel to aid in preparation for anticipated litigation, I find Bechtel's current, preliminary analysis to be ***unusable for that purpose.*** This does not mean that Bechtel's personnel do not have the qualifications necessary to provide meaningful information. It simply means that the analysis is not sufficiently mature to provide meaningful insights into the schedule or the anticipated completion date. Preliminary conclusions often have this shortcoming.

Id. (emphasis added).

At the urging of Santee Cooper, Mr. Wenick subsequently worked with Bechtel on the preparation of a final report, even though he believed the EPC Amendment made such a report generally unnecessary. In a November 18, 2015 email to Mr. Carter and Mr. Marsh, Mr. Wenick explained that he had received a draft report from Bechtel, but that the recent EPC Amendment, for the most part,[11] "promises to make such litigation unnecessary" and "also made many of Bechtel's comments obsolete . . . ." Ex. 30. Mr. Wenick recommended not putting the report into final form, "unless and until something were to happen that led to litigation." *Id.*

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[11] While the EPC Amendment resolved many issues between the Owners and the Consortium, it did not resolve all of them. In fact, after execution of the EPC Amendment, additional disputes between the Owners and the Consortium arose, some of which were eventually litigated and resolved by a Dispute Resolution Board.

On January 14, 2016, SCE&G, Santee Cooper, and Mr. Wenick met to discuss how to proceed with the drafts; in particular, Santee Cooper desired a written work product. According to Mr. Byrne's hand-written notes from the meeting, Mr. Wenick noted that, "many Bechtel recommendations [were] moot[ed] by [the] new agreement" and noted that Bechtel itself had said a "more robust" analysis would be needed. Ex. 31. Also according to Mr. Byrne's notes, Mr. Marsh stated, "We didn't engage to come up w/ new predicted completion date." *Id.* Further, according to Mr. Byrne's notes, Mr. Carter stated at this meeting: "Other SKED estimates no longer relevant – need Fluor input on what they can do. Could we have 2 reports one public/one not"? *Id.* Thus, the concept of having a separate report for the schedule assessment was first raised by Santee Cooper's Chief Executive Officer, not SCE&G. Bechtel ultimately provided Mr. Wenick with two reports in February 2016: a "Project Assessment Report" (which did not contain Bechtel's schedule analysis) and a "Schedule Assessment Report" (which did). Mr. Wenick provided the Project Assessment Report, but not the Schedule Assessment Report, to SCE&G and Santee Cooper. Ex. 32. The Project Assessment Report was for the most part similar to the findings in the October 2015 presentation, but did not contain the Bechtel-devised hypothetical schedule.

B. The Bechtel Materials Are Privileged.

The facts surrounding the Bechtel Materials make clear that SCE&G had sound legal footing to claim the protection of the attorney-client and work product privileges over them. As described above, Bechtel conducted its assessment of the Project for the primary purpose of assisting Smith, Currie & Hancock in giving legal advice about potential litigation with the Consortium. This places the Bechtel Materials squarely within widely accepted definitions of the attorney-client and work product privileges. And while Santee Cooper may have disclosed the

Bechtel Report over SCE&G's objection,[12] its unilateral conduct did not waive SCE&G's attorney-client privilege over the Bechtel Materials. Finally, ORS has failed to make a showing that the crime-fraud exception to attorney-client privilege applies.

1. The Bechtel Report Was Created at the Direction of an Attorney to Assist with Legal Advice Regarding Possible Litigation Against the Consortium.

Bechtel conducted its assessment of the Project for the Owners' legal counsel to assist it in giving legal advice about possible litigation against the Consortium. This makes the Bechtel Materials privileged. As ORS concedes, attorney-client privilege "has been applied to outside consultants hired by an attorney to assist in the rendition of legal services." ORS Mot. at 6. Indeed, it is well established that an attorney may use an outside consultant, such as an accountant, to analyze or translate client information without waiving attorney-client privilege. *See United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961). Courts have extended this principle to environmental and engineering consultants. *See Graff v. Haverhill N. Coke Co.*, No. 1:09-cv-670, 2012 WL 5495514, at *15 (S.D. Oh. Nov. 13, 2012); *Olson v. Accessory Controls & Equip. Corp.*, 757 A.2d 14, 22 (Conn. 2000); *Sunnyside Manor, Inc. v. Twp. of Wall*, No. CIV.A. 02-2902 MCL, 2005 WL 6569572, at *4 (D.N.J. Dec. 22, 2005).

Contrary to ORS's suggestion, there is no requirement that the consultant's work must be devoid of business purposes to qualify for the privilege. Attorney-client privilege attaches to a communication so long as the client consults with the lawyer "for the purpose of obtaining legal assistance and not *predominately* for another purpose." Restatement (Third) of the Law Governing Lawyers § 72 cmt. c (2000) (emphasis added). Accordingly, courts have held that communications related to an internal investigation are privileged so long as obtaining legal advice was a significant

[12] Santee Cooper provided the Bechtel Report to the Governor of South Carolina, who in turn provided the report to the news media, despite the separate written requests of Santee Cooper and SCE&G to keep the report confidential due to its privileged nature. Exs. 36-38.

purpose of the investigation, even if it was not the exclusive purpose. *See In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758–59 (D.C. Cir. 2014) ("So long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney privilege applies, *even if there were also other purposes for the investigation* and even if the investigation was mandated by regulation rather than simply an exercise of company discretion.") (emphasis added).

The cases cited by ORS are consistent with this rule. For example, *AVX Corp. v. Harry Land Co.* involved environmental consultants who performed their own remedial measures on the client's property. No. 4:07-CV-3299-TLW-TER, 2010 WL 4884903, at *9 (D.S.C. Nov. 24, 2010). The district court concluded that the consultants "were providing environmental services directly to" the client rather than assistance to the client's attorney. *Id.* Moreover, the district court held that the client had waived any claim to attorney-client privilege by submitting an insufficient privilege log. *Id.* at *11.

As reflected in the PSA, the Owners' legal counsel engaged Bechtel to assist with legal advice regarding possible litigation with the Consortium. Moreover, Bechtel referred to this legal purpose throughout its assessment, including in its October 22, 2015 presentation to SCE&G and Santee Cooper. This written, contemporaneous evidence of Bechtel's, Smith, Currie & Hancock's and the Owners' intentions for the Bechtel assessment takes precedence over ORS's after-the-fact and self-serving opinions about what it believes any party "was interested in" or "wanted" with respect to Bechtel. *See* ORS Mot. at 8. As a binding document setting forth the terms of Bechtel's engagement, the PSA also supersedes any of the cherry-picked statements relied upon by ORS during the negotiation of that engagement. *See id.* at 9–10. Given this clear evidence of intent to assist with legal advice, the fact that the Bechtel Report may have also served some business purposes for the Owners does not take the Report outside the privilege.

ORS's own exhibits also support the legal purpose behind Smith, Currie & Hancock's engagement of Bechtel. For example, the "General Talking Points" for a November 14, 2014 Nuclear Construction meeting, included as part of Exhibit E to ORS's motion, notes that SCE&G and Santee Cooper would have withheld $75 million in payments from the Consortium by November 2015. ORS Ex. E, at 00178517. Likewise, the "Message from the CEO" document, also included as part of Exhibit E, notes that "If the Consortium is not going to be open and cooperative with this plan . . . unfortunately the Owners will be left with one path forward (litigation) . . . and we do not want to go there." ORS Ex. E, at 00171547.

2. Santee Cooper's Disclosure of the Bechtel Report Did Not and Cannot Waive SCE&G's Privilege.

Santee Cooper's subsequent public disclosure of the Bechtel Report did not destroy SCE&G's privilege over the Bechtel Materials. *See* ORS Mot. at 4–5. While Santee Cooper may have waived its *own* attorney-client privilege, it cannot unilaterally waive SCE&G's privilege. In South Carolina, "[t]he attorney-client privilege belongs solely to the client and can only be waived by the client." *State v. Thompson*, 329 S.C. 72, 76 (1998). This waiver "must be distinct and unequivocal." *Id.* at 76-77.

Courts consistently have held that when multiple clients are represented by the same attorney, one client may not unilaterally waive the attorney-client privilege for another client. *See In re Grand Jury Subpoenas, 89-3 and 89-4, John Doe 89-129*, 902 F.2d 244, 248–49 (4th Cir. 1990) ("[A] joint defense privilege cannot be waived without the consent of all parties who share the privilege."); *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 363 (3d Cir. 2007) ("Moreover, waiving the joint-client privilege requires the consent of all joint clients."); *see also* Restatement (Third) of the Law Governing Lawyers § 75 cmt. e (2000) ("One co-client does not have authority

to waive the privilege with respect to another co-client's communications to their common lawyer.").

This is true even if one client has already disclosed privileged information, as Santee Cooper has done with the Bechtel Report. The disclosed information remains privileged as to the non-waiving client and may not be used against that client. For example, the Northern District of Oklahoma has held that plaintiffs in a securities action could "waive their attorney client privilege without repercussions to the attorney client privilege of other joint clients." ***See In re CFS-Related Sec. Fraud Litig.***, 223 F.R.D. 631, 634 (N.D. Okla. 2004). The District of Delaware likewise held that one client's production of documents did not waive other clients' claim of privilege over those same documents. *See Magnetar Techs. Corp. v. Six Flags Theme Park Inc.*, 886 F. Supp. 2d 466, 486 (D. Del. 2012), *aff'd sub nom. Magnetar Techs. Corp. v. Six Flags Theme Parks Inc.*, No. CV 07-127-LPS-MPT, 2014 WL 545440 (D. Del. Feb. 7, 2014).

Here, there is no dispute that Santee Cooper, not SCE&G, disclosed the Bechtel Report as well as related communications. This action may have waived Santee Cooper's claim of privilege over the Report, but it did not waive SCE&G's. To hold otherwise would leave SCE&G at the mercy of its fellow co-owner of the Project, and would establish a rule that strongly discourages cooperation and joint representation among co-defendants or co-plaintiffs in South Carolina.

3. The Crime-Fraud Exception Does Not Apply.

ORS argues in a footnote that, even if the Bechtel Materials are attorney-client communications, they fall within the crime-fraud exception to the privilege. *See* ORS Mot. at 4 n.5 (citing *Ross v. Med. Univ. of S.C.*, 317 S.C. 377, 383–84 (1994)). But this conclusory argument falls far short of the showing needed to apply the crime-fraud exception. While South Carolina courts have not spoken directly on the subject, federal law recognizes that "the party invoking the crime-fraud exception must make a prima facie showing that (1) the client was engaged in or

planning a criminal or fraudulent scheme when he sought the advice of counsel to further the scheme, and (2) the documents containing the privileged materials bear a close relationship to the client's existing or future scheme to commit a crime or fraud." *In re Grand Jury Proceedings* #5 *Empanelled Jan. 28, 2004*, 401 F.3d 247, 251 (4th Cir. 2005).

This showing requires "more than mere allegations." *Parkway Gallery Furniture, Inc. v. Kittinger/Pa. House Grp., Inc.*, 116 F.R.D. 46, 53 (M.D.N.C. 1987); *see also In re Infinity Bus. Grp., Inc.*, 530 B.R. 316, 325 (Bankr. D.S.C. 2015) (showing not met where party offered only "generic references to the Complaint"). Rather, a party asserting the crime-fraud exception must offer some *evidence* that the two prongs of the prima facie showing are met. *See In re Grand Jury Proceedings*, 401 F.3d at 251.

The entirety of ORS's crime-fraud argument is the following sentence, located in a footnote: "Even if SCE&G could argue Bechtel was retained to assist SCE&G's attorney in providing legal advice, because SCE&G failed to disclose Bechtel's assessment and Report to further SCE&G's fraudulent or criminal conduct, no documents or communications between SCE&G and Bechtel are protected by privilege." ORS Mot. at 4 n.5. Aside from not offering any evidence whatsoever to support its claims of fraud, this argument is circular: SCE&G did not provide the Bechtel Report to ORS precisely *because* SCE&G believes the report is privileged. ORS's argument is thus that SCE&G's assertion of attorney-client privilege itself creates a crime-fraud exception to the privilege. This is not the law. Further, ORS was well aware of the existence of the Bechtel assessment. As noted above, in 2015, ORS selected Smith, Currie & Hancock's July 2015 and August 2015 invoices for review, which provided details about Smith, Currie & Hancock's engagement of Bechtel. Wicker Aff. ¶ 6. Moreover, ORS included as part of its "SCE&G VC Summer Units 2 & 3 October 27 & 28, 2015 Site Visit Agenda" the following:

"Discuss the Status of the Bechtel Assessment and the top ten issues noted thus far." Ex. 40. Thus, while SCE&G had no duty to disclose the assessment, it nevertheless did not fail to disclose the assessment, as ORS claims; ORS knew of the assessment.

* * *

In sum, the record clearly shows that the Bechtel Report is not a "smoking gun" on this Project. SCE&G had ample legal basis to assert privilege over the Bechtel Materials, and the Bechtel Materials are privileged. Further, the Bechtel Report itself was limited in scope and time, and Bechtel's secret communications with Santee Cooper without the knowledge or consent of the Smith, Currie & Hancock law firm or SCE&G reveal an undisclosed and improper purpose of Bechtel's engagement – to pave the way for a more lucrative role for Bechtel in the Project going forward. Finally, the findings of the Report were consistent with previously disclosed information about the Project.

II. Request No. 5-25: Cloned Request for Government Productions.

Request No. 5-25 asks Joint Applicants to produce all documents provided to various federal and state agencies in connection with pending criminal and regulatory investigations. In demanding this information, ORS overlooks the obvious: in response to the 369 other Requests ORS has served in this proceeding, SCE&G has agreed to produce all information that has any reasonable connection to the Project. To the extent Request 5-25 seeks additional information beyond what SCE&G has agreed to provide to ORS in response to these other Requests, it is overbroad and unduly burdensome. As has been publicly disclosed, the criminal and regulatory investigations are sweeping in scope, and they relate to matters that have a more limited connection to the Project. ORS does not even attempt to describe how documents produced in these unrelated investigations are connected to the issues before the PSC in this matter.

South Carolina law requires that discovery requests "must be 'reasonably tailored' to include only relevant matters." *Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dept. of Health & Envtl. Control*, 387 S.C. 380, 388-89 (2010). But "cloned" discovery requests like Request No. 5-25—that is, requests that demand all documents produced in a separate proceeding without any showing of discoverability in the current proceeding—are inherently *not* reasonably tailored and routinely found improper.

Courts regularly refuse to enforce discovery requests like Request No. 5-25. *See, e.g.*, *Wollam v. Wright Med. Grp.*, No. 10-cv-03104-DME-BNB, 2011 WL 1899774, at *1 (D. Colo. May 18, 2011) ("I agree with the many courts that have considered the question and have held that cloned discovery is not necessarily relevant and discoverable."); *Midwest Gas Servs. Inc. v. Ind. Gas Co., Inc.*, No. IP99-0690-C-Y/G, 2000 WL 760700, at *1 (S.D. Ind. Mar. 7, 2000) (refusing to compel production of documents provided to the United States in response to a civil investigation demand absent a showing of relevance to the action); *Chen v. Ampco Sys. Parking*, No. 08-CV-0422-BEN (JMA), 2009 WL 2496729, at *2 (S.D. Cal. Aug. 14, 2009) (holding that the defendant "appropriately objects to Plaintiff's 'attempt to piggyback on the discovery conducted in the state cases without a sufficient showing of relevance'"). As these courts explain, parties seeking discovery "must do their own work and request the information they seek directly" by making "proper requests describing the information in which they are interested." *Midwest Gas Servs.*, 2000 WL 760700, at *1.

Consistent with this well-established law, the South Carolina Court of Common Pleas recently denied a motion to compel a similar cloned request in a ratepayer class action against SCE&G. *See* Order Submitted May 22, 2018, *Cleckley v. SCE&G*, 2017-CP-40-04833. Similar to ORS's request here, the plaintiff in *Cleckley* sought production of any documents related to the

Project that SCE&G had provided in response to a subpoena, including to various federal and state agencies. SCE&G argued this request was not reasonably tailored to the matters at issue in the litigation. The court agreed and denied the plaintiff's motion to compel.

Request No. 5-25 is no different than the cloned request rejected in *Cleckley*. ORS tries to distinguish *Cleckley* by arguing that, unlike in the ratepayer litigation, *any* evidence of wrongdoing by SCE&G "goes directly to the determination of prudency." ORS Mot. at 12. That is not accurate. The criminal and regulatory investigations involve various matters beyond those pending before the PSC related to the Project. For instance, the Securities and Exchange Commission has sought documents that relate to information provided to investors in quarterly earnings calls, regardless of whether it related to the Project.

In any event, ORS's contention in this regard proves too much. ORS has a limited purpose of representing the public interest before the Commission. *See* S.C. Code Ann. § 58-4-50. ORS's argument for Request 5-25, by contrast, would give it plenary authority to investigate the possible violation of any state or federal law or regulation by SCE&G. ORS simply does not have such authority. Like any other litigant (including any state agency), ORS must tailor its requests to matters at issue at this proceeding.

Moreover, Joint Applicants already have agreed to produce material relevant to the claims at issue in this proceeding and other proceedings involving ORS, and indeed, SCE&G has produced, and is continuing to produce, to ORS responsive documents that were also produced to federal and state agencies in connection with various investigations. ORS's disagreement with Joint Applicants is, at its core, that Joint Applicants have refused to produce all materials provided to government agencies *regardless* of their relevance to proceedings involving ORS. This

sweeping demand clearly goes beyond the limits on discovery set by South Carolina law and represents a classic "fishing expedition."

Finally, ORS's complaint that Joint Applicants responded to Request No. 5-25 by "asserting generic, boilerplate objections of overbreadth, undue burden, irrelevance, duplicity, and harassment" is ill-founded. The specificity of SCE&G's objections is concomitant with the specificity of Request No. 5-25. Given that ORS requested virtually every document produced to government agencies in matters "arising out of" the Project, Joint Applicants had no choice but to object in equally broad strokes. It is ORS's responsibility to serve "direct requests" for information relevant to the subject matter of these proceedings. *Midwest Gas Servs.*, 2000 WL 760700, at *1. If ORS fails to do so, it cannot then complain that Joint Applicants' responses lack ORS's desired level of specificity.

III. Requests Nos. 4-27, 4-69, 5-26, 6-16, 6-30: Privilege Log.

With respect to Requests Nos. 4-27, 4-69, 5-26, 6-16, and 6-30, ORS simply complains that it has not received a privilege log as soon as it would prefer. Of course, there is no deadline associated with providing a privilege log, and ORS has not even attempted to negotiate with SCE&G regarding a reasonable time period for completing this effort. Joint Applicants have previously explained to ORS that they will provide a privilege log for these Requests as soon as practicable. Properly recording privilege log entries, however, is complex, exacting, and time-intensive. ORS has served on Joint Applicants broad discovery requests that cover large numbers of documents, many of which are plainly wholly privileged. Joint Applicants are working diligently on their log and will provide it to ORS as soon as is reasonably possible. As a result, there is nothing to compel. Of interest, in response to the discovery demands served upon ORS by Joint Applicants, ORS likewise has objected to producing documents and information on the

basis of attorney-client privilege. To date, ORS has not provided Joint Applicants any privilege log such as the one ORS now demands from SCE&G.

IV. Requests Nos. 3-24, 3-25, and 3-26: Requests Regarding Preempted South Carolina Law.

SCE&G objected to Requests Nos. 3-24, 3-25, and 3-26 because these Requests do not seek information relevant to the proceedings before the Commission. All three Requests seek information regarding whether the Project has complied with South Carolina laws on the use of unlicensed engineers.[13] But construction of a nuclear facility is subject to extraordinarily comprehensive and detailed federal regulation. And such federal regulations preempt state law. The Atomic Energy Act of 1954 ("AEA") gives the U.S. Nuclear Regulatory Commission ("NRC") "exclusive jurisdiction to regulate 'the construction and operation of any production or utilization facility.'" *Suffolk Cnty. v. Long Island Lighting Co.*, 728 F.2d 52, 58 (2d Cir. 1984) (quoting 42 U.S.C. § 2021(c)(1)). The NRC has interpreted the AEA to mean that South Carolina and other states "lack authority to license or regulate, from the standpoint of radiological health and safety, the construction and operation of production or utilization facilities (including nuclear power plants)." Interpretation of the General Counsel: AEC Jurisdiction Over Nuclear Facilities and Materials Under the Atomic Energy Act, 10 C.F.R. § 8.4 (2012).

The NRC expressly certified by regulation the design for V.C. Summer Units 2 and 3, and also reviewed and approved all changes to the design. *See* 76 Fed. Reg. 82079 (Dec. 30, 2011). This regulation incorporates detailed design and safety codes that preempt any licensing and

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[13] Specifically, Request No. 3-24 seeks information on "the requirements for approval by a Professional Engineer for the V.C. Summer Unit 2 and 3 Projects." Request No. 3-25 seeks information regarding Westinghouse's compliance with South Carolina laws requiring plans and specifications to be prepared by a licensed engineer. Requests 3-26 seeks "any memorandum, documents or opinions regarding the use of non-South Carolina licensed engineers at the V.C. Summer Unit 2 and 3 Project."

sealing requirements of South Carolina state law. Simply put, South Carolina cannot impose requirements on nuclear plant construction that differ from those approved by the NRC, and to the extent South Carolina law suggests different licensing requirements than required by the NRC, South Carolina law is not applicable to evaluating the prudency of the Project. Because federal law, not state law, governed the Project, SCE&G's compliance with the state laws referenced in Requests Nos. 3-24, 3-25, and 3-26 are not relevant to any prudency determination.

V. Requests Nos. 1-22, 1-23, 1-29,1-44, 1-45, 1-47, 2-3, 2-7, 4-26, 4-27, 4-43, 4-44, 4-66, 4-69, 4-72, 4-73, 4-74, 6-10, 6-11, 6-12, 6-13, 6-25, 6-31: Requests for Confidential and Sensitive Information.

The remaining Discovery Requests all seek confidential and sensitive information. SCE&G has agreed to make many of these documents available to ORS at its corporate office, and Dominion Energy has agreed to make its confidential documents available to ORS at the law offices of Nexsen Pruet, LLC, pending execution of a confidentiality agreement.[14]

[14] By letter dated May 31, 2018 filed with the PSC, ORS takes issue with having to view Joint Applicants' confidential information in Cayce and Columbia. ORS claims that its experts must travel to Columbia, which results in lost time and expense. To be clear, SCE&G is paying the bills of ORS's experts, not ORS; any concern of expense rests with SCE&G. As for lost time, ORS's expert Gary Jones travels from Chicago, Illinois to Columbia regularly; he is reimbursed for this expense by SCE&G, and ORS has never expressed concern about lost time. ORS's other experts reside in Georgia, and from their respective offices it is less than a four-hour drive to Columbia. ORS also ignores the fact that SCE&G has established an electronic reading room which allows ORS's experts to view documents remotely. These alleged "burdens" are hardly "significant" and in fact, do not represent burdens at all. With regard to ORS's claim of having "to fight for copies to be used in testimony and presentation to the Commission," this argument is based on pure speculation. In the 2009 Master Confidentiality Agreement that ORS cites in its May 31 letter, there is a provision that states, "ORS will promptly notify SCE&G of its desire to use any of the Confidential Information as part of any filing, argument, or hearing related to the Act. If any such use is planned, SCE&G and ORS shall meet and agree to a mutually agreeable procedure which will accommodate the needs of ORS while at the same time protecting the Confidential Information from disclosure to the public." Ex. 35. ORS has used SCE&G's confidential information in past Commission proceedings, and the parties have always reached an agreement on its use. Contrary to ORS's worry, it has never had to "fight" SCE&G on this issue.

Joint Applicants have explained their confidentiality objections in detail to ORS. Specifically, SCE&G's May 16, 2018 letter to ORS described the categories of confidential documents that ORS has requested. These include:

- Board minutes and materials regarding the merger of SCANA and Dominion Energy, which remains pending. *See* Request Nos. 1-22, 4-26, and 4-27. These materials, which are not public, contain detailed discussions about the companies' strategic plans. Their disclosure could interfere with the companies' ability to finalize the merger.

- Detailed information about compensation and benefits of SCE&G employees. *See* Request Nos. 1-44, 1-45, 6-10, 6-11, 6-12, 6-13. These materials, which are also not public and which are confidential within SCE&G, implicate personal and corporate confidentiality concerns about employee compensation.

- Documents subject to preexisting contractual confidentiality obligations. *See* Request Nos. 4-43, 4-44, 6-25. A confidentiality agreement between SCE&G and ORS is necessary for SCE&G to maintain its contractual obligations to third parties with respect to those documents.

- Various corporate financial and accounting models. *See* Request Nos. 1-29, 1-147, 2-3, 4-66, 4-72, 4-73, 4-74, 6-31. These models contain sensitive financial information that SCE&G relies on for strategic business decisions. Their disclosure would harm SCE&G's competitive position.

- Confidential audit reports and materials prepared by third-party consultants. *See* Request Nos. 1-23, 2-7. Reports prepared by SCANA's Audit Service Department for SCE&G and SCANA contain highly sensitive, non-public data that informs strategic decisions by SCE&G management. Their disclosure would also harm SCE&G's competitive position.

These are among the most sensitive documents SCE&G and Dominion Energy maintain, and their disclosure risks substantial competitive harm to both entities. As a result, SCE&G and Dominion Energy continue to believe that it is appropriate that these materials be covered by a straightforward confidentiality agreement that preserves Joint Applicants' legitimate confidentiality interests. ORS asserts that "no additional protection is needed" for confidential materials in light of a 2009 Master Confidentiality Agreement for Base Load Review Act ("BLRA") proceedings and nuclear construction (the "Master Agreement"). ORS Mot. at 16. But

it has been unclear to Joint Applicants whether ORS views this Master Agreement as also covering the present proceedings before the Commission. As ORS is well aware, the Master Agreement was drafted in connection with requests related to construction of the Project. If ORS concedes in writing that the Master Agreement also covers the present consolidated proceedings and any other matters pending before the PSC against Joint Applicants related to or arising out of the Project, the pending merger, and/or the abandonment of the Project, SCE&G will withdraw its objections based on the lack of a sufficient confidentiality order.[15]

Notwithstanding the above, Joint Applicants expect ORS to honor any confidential designations made pursuant to the confidentiality agreement, whether it is the Master Agreement or a different one, and to not disclose such documents beyond the permissible recipients. ORS's assertion that "no additional protection is needed" for confidential materials is concerning, given ORS's repeated litigation of this case through the media. ORS and the other participants in proceedings before the PSC have made plain their desire to litigate these matters in the press. Even with respect to this motion, for instance, almost immediately upon Joint Applicants receiving notice of the motion, media sources had reported on the motion and repeated its assertions that SCE&G "misled" lawmakers about the Bechtel Report. *See* Sammy Fretwell & Avery G. Wilks,

[15] On May 1, 2018, SCE&G clearly informed ORS of its position concerning the 2009 Master Confidentiality Agreement and stated that if ORS wished to have access to Joint Applicants' confidential information related to the merger docket, then ORS would be required to execute a separate confidentiality agreement. Ex. 33. In response, on May 2, 2018, counsel for ORS asked SCE&G's counsel to provide a "merger docket confidentiality agreement." *Id.* On May 3, 2018, and by email, SCE&G's counsel complied and provided the requested "merger docket confidentiality agreement." *Id.* To date, ORS has not responded to SCE&G's May 3 email.

SCE&G misled lawmakers about critical nuclear report, state agency says, The State (May 23, 2018).[16] Particularly given the focus of the public, and in light of the confidential nature of the material that ORS seeks, Joint Applicants have a legitimate concern that, without an adequate confidentiality agreement or protective order, confidential and sensitive information handed over to ORS might find its way to the public sphere.

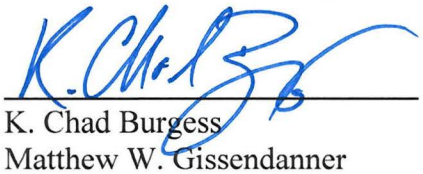
CONCLUSION

The Commission should deny ORS's motion in its entirety.

[SIGNATURE PAGES FOLLOW]

[16] Counsel for Joint Applicants received ORS's Motion to Compel by electronic mail on May 23, 2018, at 6:37 p.m. Ex. 34. ORS's legal pleading, including the exhibits attached to it, consisted of 94 pages. Less than 35 minutes later, at 7:10 p.m., The State newspaper had published its article on its website regarding ORS's motion. *See* Sammy Fretwell & Avery G. Wilks, *SCE&G misled lawmakers about critical nuclear report, state agency says*, The State (May 23, 2018).

Respectfully submitted,



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